UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2013 MSPB 69

Docket No. CH-1221-12-0436-W-1

Joseph A. O'Donnell,
Appellant,
v.
Department of Agriculture,
Agency.

September 10, 2013

Joseph A. O'Donnell, Camden, Indiana, pro se.

Shelli S. Moore, Huron, South Dakota, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

OPINION AND ORDER

¶1 The appellant has petitioned for review of the initial decision that dismissed his individual right of action (IRA) appeal for lack of jurisdiction on the basis of collateral estoppel. For the reasons discussed below, we VACATE the initial decision but still DISMISS the appeal for lack of jurisdiction because the appellant failed to make a nonfrivolous allegation that he made a protected disclosure.

BACKGROUND

¶2 The following facts appear to be undisputed. The appellant is a Soil Conservationist for the agency's Natural Resources Conservation Service (NRCS). Initial Appeal File (IAF), Tab 9 at 20 of 31. One of the appellant's duties is to oversee agency programs that help private landowners to apply conservation practices on their land. IAF, Tab 9 at 17 of 35, Tab 8, Subtab A at 4. This includes determining whether customers and their land meet the agency's eligibility criteria for assistance. IAF, Tab 9 at 17-18 of 35, Tab 8, Subtab A at 4.

¶3 In the spring of 2005, at an agency-sponsored event, the appellant met a landowner who expressed interest in converting some of his property into wetland. IAF, Tab 8, Subtab A at 33. The appellant inspected the proposed site, conducted some research, and determined that the site was eligible for enrollment under the agency's Conservation Reserve Program. *Id*. The landowner submitted an application to the agency's local Farm Service Agency (FSA) committee, which approved the application on November 21, 2005.[1] *Id*. at 33. The landowner began work on the project shortly thereafter. *Id*. at 5, 33.

¶4 However, the appellant's supervisor disagreed with the appellant's eligibility determination. On January 9, 2006, he explained the reasons for his disagreement and directed the appellant to inform the FSA that NRCS finds the project not feasible and will not support it. IAF, Tab 8, Subtab A at 19, Tab 9 at 14 of 35. The appellant sent the FSA two memoranda to that effect. IAF, Tab 8, Subtab A at 58-59. The FSA terminated the contract and the landowner appealed to a higher level within the FSA. *Id*. at 5.

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[1] The parties did not explain the respective roles of the NRCS and the FSA in administering the Conservation Reserve Program. Based on the parties' submissions, it appears that these agency components share that responsibility, with the FSA handling the funding aspect and the NRCS performing most of the technical work, including determining whether a project is feasible and appropriate from a scientific and engineering standpoint. IAF, Tabs 8, 9.

¶5 On March 20, 2006, the agency conducted a hearing on the matter, and an FSA official asked the appellant to provide a review of the factors that NRCS considered in making the adverse eligibility determination. IAF, Tab 8, Subtab A at 5. Rather than conveying NRCS management's position on the matter, the appellant sent the FSA a memorandum stating his disagreement with that position and concluding that "[t]he decision to terminate the contract was made in error and I believe that [the landowners] should prevail in their appeal."[2] *Id*. at 33-34.

¶6 In response to the appellant's memorandum, the agency proposed a 5-day suspension for the appellant's "[d]eliberate or malicious refusal to comply with rules, regulations, written procedures, or proper supervisory instructions." IAF, Tab 8, Subtab A at 15-16. The agency stated in part that

> Once your supervisor makes a decision, you do not have the authority to disregard that decision and communicate to the client or another agency that you disagree and are reversing that decision. Your responsibility is to support the agency's decision, even if you personally disagree.

Id. at 15. The appellant responded, again explaining his disagreement with NRCS's decision and arguing that it was both his right and his obligation to offer his own professional opinion to the FSA. *Id*. at 18-22. After considering the appellant's response, the agency affirmed the charge but imposed only a 3-day suspension. *Id*. at 23-24.

¶7 The appellant filed a complaint with the Office of Special Counsel (OSC), which analyzed the complaint under 5 U.S.C. § 2302(b)(9). *O'Donnell v. Department of Agriculture*, MSPB Docket No. CH-1221-11-0268-W-1, IAF, Tab 14 at 24-25. OSC closed the file without taking corrective action, and the appellant filed a Board appeal. *O'Donnell*, MSPB Docket No. CH-1221-11-0268-

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[2] The appellant characterizes his disclosure as "testimony." IAF, Tab 8, Subtab A at 5. It appears that the memorandum is a summary of hearing testimony that the appellant gave to the same effect. *Id*. at 19.

W-1, IAF, Tab 1, Tab 14 at 23. The administrative judge dismissed the appeal for lack of jurisdiction. *O'Donnell*, MSPB Docket No. CH-1221-11-0268-W-1, IAF, Tab 18. She found, in relevant part, that the Board lacked jurisdiction over the matter as an IRA appeal because the appellant failed to exhaust his administrative remedies with OSC. *Id*. Specifically, she found that the appellant's complaint to OSC under 5 U.S.C. § 2302(b)(9) did not provide a basis for the Board to take jurisdiction over the matter as an IRA appeal because such appeals could only be brought under 5 U.S.C. § 2302(b)(8).[3] The appellant petitioned for review and the Board issued a final decision affirming the initial decision. *O'Donnell*, MSPB Docket No. CH-1221-11-0268-W-1, Petition for Review (PFR) File, Tabs 1, 3.

¶8 The appellant then filed another OSC complaint seeking corrective action under 5 U.S.C. § 2302(b)(8). IAF, Tab 8, Subtab A at 1-9. OSC closed the file without taking corrective action, and the appellant filed the instant appeal. IAF, Tab 1, Tab 8, Subtab A at 60. The administrative judge dismissed the appeal for lack of jurisdiction, finding that the appellant's whistleblowing claim was barred by the doctrine of collateral estoppel based on his prior appeal. Initial Appeal File (IAF), Tab 18, Initial Decision (ID). The appellant has filed a petition for review, and the agency has filed a response. PFR File, Tabs 1, 5.

ANALYSIS

The appellant is not collaterally estopped from establishing jurisdiction over the instant appeal.

¶9 The Board has jurisdiction over an IRA appeal if the appellant has exhausted his administrative remedies before OSC and makes nonfrivolous

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[3] After the Board's decision became final, the Whistleblower Protection Enhancement Act of 2012, Pub. L. No. 112-199, 126 Stat. 1465, became law and extended IRA coverage to certain 5 U.S.C. § 2302(b)(9) activities as well. *See* 5 U.S.C. § 1221(a) (2012). We do not construe the instant appeal as a request to reopen the prior appeal, which was correct under the law in effect at the time it was decided.

allegations that: (1) He engaged in whistleblowing activity by making a protected disclosure, and (2) the disclosure was a contributing factor in the agency's decision to take or fail to take a personnel action. *Yunus v. Department of Veterans Affairs*, 242 F.3d 1367, 1371 (Fed. Cir. 2001).

¶10 Collateral estoppel, or issue preclusion, is appropriate when: (1) The issue is identical to that involved in the prior action; (2) the issue was actually litigated in the prior action; (3) the determination on the issue in the prior action was necessary to the resulting judgment; and (4) the party against whom issue preclusion is sought had a full and fair opportunity to litigate the issue in the prior action, either as a party to the earlier action or as one whose interests were otherwise fully represented in that action. *E.g.*, *Jenkins v. Environmental Protection Agency*, 118 M.S.P.R. 161, ¶ 22 (2012) (citing *Kroeger v. U.S. Postal Service*, 865 F.2d 235, 239 (Fed. Cir. 1988)).

¶11 In this case, the administrative judge found that the issue of whether the appellant's 3-day suspension was issued in reprisal for his alleged whistleblowing was identical in each appeal, was actually litigated in the prior appeal, and the determination on that issue was necessary to the resulting judgment in the prior appeal. ID at 4. Because she further found that the appellant had a full and fair opportunity to litigate the issue in the prior appeal, the administrative judge dismissed the instant appeal as barred by collateral estoppel. ID at 4-5.

¶12 However, the appellant's prior appeal involved allegations of reprisal under 5 U.S.C. § 2302(b)(9), not 5 U.S.C. § 2302(b)(8). The initial decision in the prior appeal makes clear that the appellant did not exhaust his administrative remedies before OSC on the issue of whether his 3-day suspension was imposed in reprisal for protected whistleblowing under 5 U.S.C. § 2302(b)(8). *O'Donnell v. Department of Agriculture*, MSPB Docket No. CH-1221-11-0268-W-1, Initial Decision (Apr. 28, 2011); *see* IAF, Tab 9 at 34-35 of 44. Moreover, the Board's nonprecedential final order in that appeal, *O'Donnell*, MSPB Docket No. CH-1221-11-0268-W-1, PFR File, Tab 3, similarly notes that the appellant did not

allege reprisal for whistleblowing in violation of 5 U.S.C. § 2302(b)(8) before OSC, *see* IAF, Tab 9 at 26 n.3 of 44. Because the jurisdictional issues in the instant appeal, including the issue of the appellant's exhaustion of his remedies before OSC, are different from the issues presented in his prior appeal, we find that the appellant is not collaterally estopped from establishing jurisdiction over the instant appeal. *See Pashun v. Department of the Treasury*, 74 M.S.P.R. 374, 380 n.2 (1997).

The appellant has not made a nonfrivolous allegation that his disclosure was protected.

¶13 Nevertheless, we agree with the administrative judge's ultimate conclusion that the Board lacks jurisdiction over the instant appeal. For the following reasons, we find that the appellant failed to make a nonfrivolous allegation that his disclosure was protected under 5 U.S.C. § 2302(b)(8).[4] *See Tuten v. Department of Justice*, 104 M.S.P.R. 271, ¶ 11 (2006).

¶14 It is well-settled that statutory protection for whistleblowers "is not a weapon in arguments over policy or a shield for insubordinate conduct. Policymakers and administrators have every right to expect loyal professional service from subordinates . . . ." *LaChance v. White*, 174 F.3d 1378, 1381 (Fed. Cir. 1999). In this case, the appellant repeatedly and vaguely objects to NRCS's ineligibility ruling as "contrary to policy," "not supported by official program policy," inconsistent with "NRCS civil rights policy," and so forth. IAF, Tab 8, Subtab A at 5, 14, 20, 22, 27, Tab 11 at 1, Tab 14 at 1. This is exactly the type of fairly debatable policy dispute that does not constitute gross mismanagement.

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[4] In reaching our decision, we have applied § 101 of the Whistleblower Protection Enhancement Act of 2012 (WPEA), which became law during the pendency of this appeal. *See Day v. Department of Homeland Security*, 2013 MSPB 49, ¶ 26 (the Board will apply to pending cases the WPEA's clarification of what constitutes a protected disclosure).

See White v. Department of the Air Force, 391 F.3d 1377, 1382 (Fed. Cir. 2004) (for a lawful policy decision to constitute gross mismanagement, its impropriety must not be "debatable among reasonable people"). Nor has the appellant made a nonfrivolous allegation that the eligibility determination at issue was unlawful. The appellant has submitted materials describing the agency's Conservation Reserve Program, IAF, Tab 8, Subtab A at 35-56, but none of those materials limit the agency's discretion in making eligibility determinations; nor do they require the agency to extend the program's benefits to every property that meets the eligibility criteria.

¶15 Furthermore, the Federal Circuit has found that an employee's disagreement with an agency ruling or adjudication does not constitute a protected disclosure even if that ruling was legally incorrect. *Meuwissen v. Department of the Interior*, 234 F.3d 9, 13-14 (Fed. Cir. 2000).[5] An erroneous agency ruling is not a "violation of law." *Id.* at 13. Such rulings are corrected through the appeals process – not through insubordination and policy battles between employees and their supervisors. *Id.* at 14. There are a large number of federal agencies, from the Department of Agriculture to the Department of Veterans Affairs to the Social Security Administration to the Merit Systems Protection Board, that rule on citizens' applications for benefits or redress every day. The orderly administration of these agencies requires that, for better or for worse, supervisors and managers have the final say in such rulings. A subordinate's refusal to abide his supervisor's instructions in this regard supplants the orderly appeals process

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[5] *Meuwissen*, 234 F.3d at 12-13, was legislatively overruled by the WPEA to the extent that the court found that the appellant did not make a "disclosure" because the administrative ruling with which he disagreed was already publically known. Whistleblower Protection Enhancement Act of 2012, § 101(b)(2)(C) *(codified at* 5 U.S.C. § 2302(f)(1)(B) (2012)). Nevertheless, the WPEA did not disturb the court's more general finding that erroneous administrative rulings are not the type of danger or wrongdoing that whistleblower protections were meant to address. We remain bound by the court's finding in that regard, and we believe that it was correct.

with chaotic agency in-fighting. Such insubordination is not protected by 5 U.S.C. § 2302(b)(8).

ORDER

¶16 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request review of this final decision by the United States Court of Appeals for the Federal Circuit.

The court must receive your request for review no later than 60 calendar days after the date of this order. *See* 5 U.S.C. § 7703(b)(1)(A) (as rev. eff. Dec. 27, 2012). If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you want to request review of the Board's decision concerning your claims of prohibited personnel practices under 5 U.S.C. § 2302(b)(8), (b)(9)(A)(i), (b)(9)(B), (b)(9)(C), or (b)(9)(D), but you do not want to challenge the Board's disposition of any other claims of prohibited personnel practices, you may request the United States Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction to review this final decision. The court of appeals must receive your petition for review within 60 days after the date of this order. *See* 5 U.S.C. § 7703(b)(1)(B) (as rev. eff. Dec. 27, 2012). If you choose to file, be very careful to file on time. You may choose to request review of the Board's decision in the United States Court of Appeals for the Federal Circuit or any other court of appeals of competent jurisdiction, but not both.

Once you choose to seek review in one court of appeals, you may be precluded from seeking review in any other court.

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703) (as rev. eff. Dec. 27, 2012). You may read this law as well as other sections of the United States Code, at our website, http://www.mspb.gov/appeals/uscode/htm. Additional information about the United States Court of Appeals for the Federal Circuit is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11. Additional information about other courts of appeals can be found at their respective websites, which can be accessed through http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx.

FOR THE BOARD:

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William D. Spencer
Clerk of the Board
Washington, D.C.